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Home | Contact Us | Frequently Asked Questions Site Map | Search Attorney General: Go

OFFICE INFORMATION
- About Us
- News
  - Latest News
  - Latest Consumer Issues and Scams
  - AG Speeches
  - Cases of Interest
- Consumer Protection
- Children and Families
- Elder Issues
- Health Issues
- Civil Rights
- Crime and Victims

Home > News > Cases of Interest > Foreign Intelligence Surveillance Act

Foreign Intelligence Surveillance Act

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BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE

FISA AMENDMENTS ACT OF 2007

Wednesday, October 31, 2007

Washington, D.C.

Chairman Leahy, Ranking Member Specter, and members of the Committee: Thank you for this opportunity to address you today on the proposed Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2007. In sum, we have grave concerns about the sweeping immunity from state investigations the Act would provide to electronic communications service providers (ECSPs) and others. We are particularly troubled by Section 204 of the Act (adding FISA § 803), which purports to preempt the well-established police powers of the states to regulate utilities doing business within their borders and safeguard the privacy and confidential information of their citizens. We urge you to remove Section 204 and preserve the appropriate balance of federal and state authority underlying our federalist system.

As the Committee is no doubt aware, we are presently representing our states in multidistrict litigation pending before the Honorable Vaughn R. Walker, Chief Judge of the Northern District of California, entitled In re National Security Agency Telecommunications Records Litigation, MDL Docket No. 06-1791 VRW. [1] The course of this litigation to date provides an object lesson on why the proposed preemption provision is inappropriate and unnecessary. Judge Walker's handling of the case demonstrates the wisdom of allowing the judiciary to continue to fulfill its role of policing the delicate balance between state and federal power and of weighing the competing policy concerns raised by the need for utilities regulation and consumer protection on the one hand and federal law enforcement and intelligence gathering on the other. To illustrate this point, we briefly summarize the litigation below.

Following citizen inquiries concerning possible unlawful disclosures of confidential telephone calling data, regulators in each state initiated administrative proceedings (and in Missouri a case was filed in state court) to determine whether local telecommunications companies had violated state law. In response, the federal government filed actions in federal district court seeking declaratory and injunctive relief aimed at halting the state proceedings. Ultimately, these cases were consolidated for adjudication before Chief Judge Walker.

The government argued that federal law preempted the state proceedings because the states were invading areas of exclusive federal control and hindering the government's national security and intelligence gathering functions. In fact, the subjects of the investigations are utilities over which each state has plenary jurisdiction. Moreover, the purpose of each state investigation is to ascertain whether any carrier has violated state law by making unauthorized disclosures, without regard to the identity of the ultimate recipient of the disclosure. And the investigations do not seek details of any intelligence activity conducted by the federal government.

Judge Walker rejected the federal government's preemption arguments, holding that "Congress did not intend to foreclose state involvement in the area of surveillance regulation" and that "the investigations do not require an act by the carriers that federal law or policy deems unlawful. Nor do the investigations pose an obstacle to the purposes and objectives of Congress." In re Nat'l Sec. Agency Telecomms. Records Litig., 2007 WL 2127345, *12, *15 (N.D. Cal. July 24, 2007) (slip copy). The court recognized that the states' authority to regulate telecommunications companies' compliance with state law could not be foreclosed because a company might have assisted an intelligencegathering operation. Indeed, to rule otherwise would eviscerate the states' longstanding police power over consumer protection (including privacy) and utilities regulation. See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 365 (1989) ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 150 (1973).

In addition to preemption, the federal government argued that the state secrets privilege precluded the states' inquiries, although this privilege has never been formally asserted by the federal government in any of the state officials' cases. Judge Walker declined to rule on how the state secrets privilege would impact the state proceedings until the Ninth Circuit Court of Appeals renders its decision in an appeal from the court's decision in Hepting v. AT&T, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (Walker, C.J.), concerning the applicability of the privilege in suits filed by individuals against telecommunications companies.[2] More specifically, the court observed that at least "some questions posed in these investigations fall outside the privilege's scope, a point the government conceded at oral argument," while noting that the states acknowledged that "some of the information sought . . . may implicate the state secrets privilege." In re Nat'l Sec. Agency Telecomms. Records Litig., 2007 WL 2127345 at *18. Accordingly, the court deferred on deciding "whether and to what extent the state investigations may proceed," id., pending further guidance from the Ninth Circuit.

As the litigation illustrates, the court system, armed with protective doctrines like the state secrets privilege, is well-equipped to balance, on a case-by-case basis, society's interest in ferreting out and addressing illegal disclosures of confidential information with its interest in shielding legitimate, necessary disclosures and safeguarding state secrets.[3] Indeed, in assessing an assertion of the state secrets privilege, courts can conduct ex parte, in camera review of sensitive information. And a review of the pertinent caselaw reveals that the courts have successfully avoided information leaks in cases in which they considered state secrets privilege claims.

By contrast, proposed § 803 is an unnecessarily blunt instrument. To begin with, the proposed preemption provision (FISA § 803) wrongly assumes that it would be harmful to the public interest to disclose any information whatsoever relating to an ECSP's provision of assistance to an element of the intelligence community. Judge Walker rightly rejected this overreaching assertion. While the extent of appropriate disclosures (for example, the identity of affected individuals and details of the assistance rendered) may be subject to debate, there is no support for the complete preclusion of any disclosure whatsoever. Society benefits in numerous ways from the transparency promoted by the states' investigative powers. Those powers should not be limited without the most compelling justification, and none can be advanced on behalf of § 803.

Moreover, the operative language employed in proposed § 803 is vague and invites self-serving and unverifiable assertions by ECSPs. Specifically, subsections (1), (2), and (4) are triggered by investigations touching on an ECSP's "alleged assistance to an element of the intelligence community." (Emphasis added.) The nonspecific use of the adjective "alleged" to qualify the term "assistance" raises a question as to whether an entity under investigation could scuttle the inquiry at its discretion, merely by alleging that its response would call for disclosure of its "assistance." The provision required no showing by an ECSP or by the Attorney General. In short, the vagueness of the provision invites overbroad or unsubstantiated assertions and would almost certainly result in litigation over its meaning and scope.

Finally, no justification exists for providing less protections for state investigations than are provided to private plaintiffs under the proposed provisions of the Act. The proposed preemption provision appears to set a lower threshold for derailing the exercise of the states' traditional police powers than is required to invoke immunity against a private lawsuit. The immunity provisions (FISA §§ 703(h)(3), 802; FISA Amendments Act § 202) require the filing of a certification from the Attorney General or the Director of National Intelligence in the litigation and provide for judicial review of certifications. The states' interests in the exercise of their sovereign powers are certainly no less compelling than a private plaintiff's. In fact, they are arguably greater and grounded in fundamental principles of constitutional law. In addition, under current law the federal government can proceed in federal court if it concludes that a state investigation implicates state secrets. Thus, the proposed preemption provision is not only antithetical to our constitutional allocation of state and federal power, but also unnecessary.

In sum, the courts are in the best position to strike an appropriate balance between the state and federal interests and have shown that they are sensitive to both. The proposed preemption provision should be deleted in its entirety.

Very truly yours,

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[1] Similar proceedings commenced in Missouri and were also consolidated into the multidistrict litigation.

Attorneys from the Missouri Public Service Commission are litigating those matters on behalf of

Commissioner Clayton.

[2] The Ninth Circuit heard argument in Hepting on August 15, 2007.

[3] For example, some of the initial information requests by the state regulators asked the carriers whether

they had shared confidential information with the NSA. The court is now poised to assess whether and, if

so, to what extent such requests violate the state secrets privilege. The court

	could also provide guidance on how such requests could be reformulated to pass muster.

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